No. 8846

United States Circuit Court of Appeals

For the Ninth Circuit

DOLLAR STEAMSHIP COMPANY, Claimant of, and the STEAMSHIP "PRESIDENT COOLIDGE" her engines, boilers, machinery, tackle, apparel and furniture,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR APPELLANT

On appeal from the United States District Court, for the Territory of Hawaii.

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I

JURISDICTIONAL FACTS

This cause of action arises upon a libel in rem filed in admiralty on August 26th, 1937, in the District Court of the United States in and for the District and Territory of Hawaii, by the United States of America against the Steamship "President Coolidge," her en-

gines, boilers, machinery, tackle, apparel and furniture, and is a libel of information for an alleged violation of *sections 407, 411 and 412, Title 33, U. S. C.* The libel is set forth on *pages 4-6* of the record.

On September 3, 1937, there was filed in the District Court of the United States in and for the District and Territory of Hawaii, a Claim of Agent on Behalf of Owner, in which the Dollar Steamship Lines, Incorporated, Limited, made claim that it was the owner of the Steamship "President Coolidge," her engines, etc., and prayed to defend accordingly (*pp. 11-13 of the record*).

It was admitted that the District Court of the United States of America had jurisdiction of this cause of action by reason of the jurisdiction in admiralty conferred upon it by *Article III, section 2 of the United States Constitution, and sub-section 3 of section 41 of Title 28, U. S. C.*

A decree was rendered by the Honorable Edward M. Watson, Judge of the District Court of the United States in and for the District and Territory of Hawaii, on the 21st day of March, 1938, in favor of the libellant and against the libellee, awarding the libellant the sum of FIVE HUNDRED DOLLARS ($500.00), together with all costs of the suit, which were taxed in the sum of THIRTY-SEVEN DOLLARS AND SIXTY-FIVE CENTS ($37.65), as a penalty for the alleged violation by libellee of *sections 407, 411 and 412, Title 33, U. S. C.* (*p. 20 of the record*).

On April 1st, 1938, the tenth day following the rendition of the decree, a Notice of and Motion for Appeal, was filed by the libellee (*p. 23 of the record*). On the same day an Assignment of Errors was filed (*pp. 24-26 of the record*). Thereupon an Order Allowing Appeal was signed by the Honorable E. M. Watson, Judge of

the United States District Court in and for the District and Territory of Hawaii (*pp. 27-28 of the record*).

A Citation on Appeal was issued to the United States of America and to Ingram M. Stainback, United States Attorney for the Territory of Hawaii, on April 1, 1938 (*pp. 28-29 of the record*).

On April 1, 1938, the same day as the allowance of the appeal, an appeal bond was filed by the libellee indemnifying the United States of America for the sum of TWO HUNDRED FIFTY DOLLARS ($250.00). On April 1st, likewise, a supersedeas bond indemnifying the United States of America, in the sum of ONE THOUSAND DOLLARS ($1,000.00) was filed, and on April 5, 1938, a praecipe was filed (*pp. 29-30 of the record*).

This Court, the Circuit Court of the United States for the Ninth Circuit, has jurisdiction of this appeal by virtue of section 86 (*d*) of the Organic Act of the Territory of Hawaii, reading:

> "Appeals from the said district court shall be had and allowed to the Circuit Court of Appeals for the Ninth Judicial Circuit in the same manner as appeals are allowed from circuit courts to circuit courts of appeal as provided by law, and appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts and circuit courts of the United States to the Supreme Court, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters, and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts

of the United States and the courts of the Territory of Hawaii." (March 3, 1905, 33 Sts. at L. c. 1465, s. 3; March 3, 1909, 35 Sts. at L. c. 269, s. 1; July 9, 1921, 42 Sts. at L. c. 42, s. 313; February 12, 1925, 43 Sts. at L. 890, c. 220; December 13, 1926, 44 Sts. at L. 919, c. 6, s. 1; 28 U. S. C. A. 345; 48 U. S. C. A. 641-645.)

II

STATEMENT OF CASE

The steamship "President Coolidge" is a steam vessel engaged in the carriage of passengers and freight between ports on the western coast of the United States and ports in the Orient with stopovers in Honolulu, City and County of Honolulu, Territory of Hawaii. She is owned by The Dollar Steamship Lines, Incorporated, Limited, which has its principal place of business in the City and County of San Francisco, State of California.

On the 26th day of August, 1937, the steamship "President Coolidge" was lying in the port of Honolulu, City and County of Honolulu, Territory of Hawaii. Shortly after she had docked one Norman R. Arthur, a boatman hired by the United States Engineer, while engaged in his duties of patrolling the harbor, cut under the counter of the steamship "President Coolidge" so that he was within six feet of the rudder post and with quite an overhang above him (*pp. 71-74 of the record*). While passing under the stern, a bucket of refuse in some way fell or was thrown upon Arthur. After cleansing the refuse from himself and changing clothes, Arthur immediately went aboard the "Presi-

dent Coolidge," to ascertain what had happened (*pp. 80-81 of the record*). Accompanied by the chief officer of the vessel Arthur and the officer questioned several employees of the vessel who were stationed at the stern but all denied any knowledge of the mishap (*p. 81 of the record*). Arthur testified that after cleaning the slop out of his eyes, he saw what he designated as "a Chinese" walking back from the rail of the vessel carrying a bucket but when he went aboard he failed to identify the person (*pp. 77-78, 94 of the record*).

Libellee's defense rested upon the testimony of several of the officers on the vessel. They all testified that they had no knowledge of any refuse being dumped overboard and had given strict orders to all employees on the vessel that no refuse of any kind was to be dumped in any harbor (*pp. 44-52, 106-133 of the record*). It was also testified, and several exhibits were admitted to show, that printed instructions in both English and Chinese were posted in conspicuous places on the vessel to the effect that no refuse was ever to be dumped while in a harbor (*pp. 37, 39, 41, 129 of the record*). The government does not contend that any officer of the company ordered the refuse to be dumped or had any knowledge of it being dumped, nor does it deny that numerous notices concerning dumping of refuse were posted on the ship. (*See Stipulation of counsel for the libellant on pp. 112, 115 of the record.)*

This appeal presents two issues, one a question of fact and the other a question of law.

It is the contention of the libellee on the issue of fact that the District Court erred in finding from the evidence, that there was any garbage thrown into the navigable waters of Honolulu Harbor.

Upon the point of law, it is the contention of the libellee that the District Court erred in holding that the steamship "President Coolidge" was a vessel "used or employed" in violation of *33 U. S. Code, sec. 407,* within the meaning of *33 U. S. Code, sec. 412.*

Both questions were first raised by the pleadings in the answer of the libellee. The libel alleges in article 2:

> "That said vessel on the 26th day of August, 1937, while in the navigable waters of the United States, to wit, Honolulu Harbor, Territory of Hawaii, was used and employed in violating the provisions of section 407 of Title 33 of the United States Code in the following manner, to wit, that during the forenoon of said date, at the place aforesaid, refuse matter, to wit, garbage consisting of celery, oranges, tea leaves, etc., was thrown, discharged and deposited from or out of said vessel into the navigable waters of the United States, to wit, Honolulu Harbor, Territory of Hawaii" (*pp. 4-5 of the record*).

Paragraph II of the answer denies the allegations of article 2 of the libel (*p. 14 of the record*). Both points were also raised at the close of the libellant's case upon oral motion by libellee to dismiss the libel (*pp. 105-106 of the record*).

III

SPECIFICATION OF ASSIGNED ERRORS TO BE RELIED UPON

All the assigned errors consisting of numbers 1 to 9 inclusive, are relied upon.

IV

ARGUMENT

IN ORDER TO CONSTITUTE A VIOLATION OF SECTION 407 U. S. CODE, TITLE 33, THERE MUST BE EVIDENCE THAT REFUSE MATTER WAS THROWN INTO THE NAVIGABLE WATERS OF THE UNITED STATES, AND THE FALLING OF REFUSE MATTER INTO A BOAT DOES NOT CONSTITUTE A THROWING INTO NAVIGABLE WATERS.

Sutherland on Statutory Construction, p. 439, *sec.* 350; 59 *C. J.* 1118, 1119.

THE THROWING OF REFUSE MATTER INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR BY SOMEONE, CONTRARY TO EXPRESS ORDERS AND REGULATIONS PROMULGATED BY THE OWNERS OF A VESSEL AND THE OFFICERS OF THE VESSEL AND WITHOUT ANY KNOWLEDGE OF SAID ACT BY THE OWNERS OR OFFICERS, DOES NOT CONSTITUTE A VESSEL BEING "USED OR EMPLOYED" IN VIOLATION OF 33 U. S. CODE, SECTION 407, WITHIN THE MEANING OF 33 U. S. CODE, SECTION 412.

United States v. The Anjer Head, 46 *Fed.* 664;

The Colombo, 28 *Fed.* (2d) 1004-5;

The J. Rich Steers, (*C.C.A.* 2) 228 *Fed.* 319;

The Pile Driver No. 2, 239 *Fed.,* 491;

The Emperor, 49 *Fed.* 752;

United States vs. Carroll Oil Terminals, Inc., 18 *Fed. Supp.* 1008;

The Watuppa, 19 *Fed. Supp.* 493;

The Albania, 30 *Fed.* (2d) 727;

Cunard S. S. Co., Limited, v. Stranahan, 134 *Fed.* 318;

The Bombay, 46 *Fed.* 665; 1 *Words & Phrases, Vol.* 8, *p.* 7229;

Shawnee Nat'l Bank v. United States, 249 *Fed.,* 583; 59 *C. J.* 1110, 1115, 1117;

The Scow No. 9, 152 *Fed.* 548;

The Scow No. 36, 144 *Fed.,* 932;

Jaycox v. United States, 107 *Fed.* 938;

Sutherland on Statutory Construction, p. 438, *sec.* 349;

United States v. 1150½ *Pounds of Celluloid,* 82 *Fed.,* 627, 634;

In re United States v. 84 *Boxes of Sugar,* 8 *L. Ed.* 749, 7 *Peters,* 462;

Huntington v. Attril, 146 *U. S.* 657, 36 *L. Ed.,* 1123;

In re M'Donough, 49 *Fed.,* 360;

United States vs. Various Tugs and Scows, 225 *Fed.* 506;

Compagnie Francaise de Navigation a Vapeur v. Elting, Collector of Customs, 19 *Fed.* (2) 773;

Hecht v. Malley, 68 *L. Ed.,* 949, 265 *U. S.* 144;

In re Cargo of the Ship Favourite, 2 *L. Ed.* 643, 4 *Cranch,* 347;

25 *R. C. L.* 1086;

16 *C. J.* 76;

25 *C. J.* 1205;

Chaffee v. U. S. 21 *L. Ed.* 908, 85 *U. S.* 516;

State v. Adams Express Co., 87 *N. E.* 712 *(Ind.);*

Barber Asphalt Paving Co. v. Peck, 186 *Mo.* 506; 85 *S. W.* 387;

Pilots v. Vanderbilt, 31 *N. Y.* 265;

Tenement House Bd., of Supervision v. Schlechter, 83 *N. J. L.* 88, 83 *Atl.* 783;

Lindberg v. Burton, 41 *N. D.* 587, 171 *N. W.* 616;

Buckeye Engine Co. v. City of Cherokee, 54 *Okl.* 509, 153 *Pac.* 1166.

Assignment No. 1

THE COURT ERRED IN RENDERING A DECREE IN FAVOR OF THE LIBELLANT.

Assignment No. 2

THE COURT ERRED IN OVERRULING THE ORAL MOTION TO DISMISS ENTERED BY THE LIBELLEE IN THIS CAUSE.

Assignment No. 3

THE COURT ERRED IN DECREEING THAT THE LIBELLANT, THE UNITED STATES OF AMERICA, RECOVER FROM THE LIBELLEE, THE STEAMSHIP "PRESIDENT COOLIDGE," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL, AND FURNITURE, AS A PENALTY, THE SUM OF $500.00.

Assignment No. 4

THE COURT ERRED IN ORDERING THAT THE LIBELLANT, THE UNITED STATES OF AMERICA, RECOVER FROM THE LIBELLEE, THE STEAMSHIP "PRESIDENT COOLIDGE," THE COST OF THESE PROCEEDINGS, TAXED IN THE SUM OF $37.65.

IS THE STATUTE PENAL?

Laws adopted by legislatures have, since the adoption of the first law, always been placed in one of two general classes: *penal* and *private*. The distinction between them is of a fundamental nature and many tests have been laid down whereby any law may be classified. The true test is whether the penalty is imposed for the punishment of a wrong to the public or for the redress of an injury to the individual. A very

good criteria for determining whether a law is penal or private, is laid down in *25 R. C. L. 1086,* where it is said:

> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. The effect and not the form of the statute is to be considered; and if its object is clearly to inflict a punishment on a person for doing what is prohibited or failing to do what is commanded to be done, it is penal in its character."

See also *59 C. J. 1110,* where the liberal view of a penal statute is set forth:

> "In common use, however, this sense has been enlarged to include under the term 'penal statutes' all statutes which command or prohibit certain acts, and establish penalties for their violation, and even those which, without expressly prohibiting certain acts, impose a penalty upon their commission."

And in *Huntington v. Attrill, 36 L. Ed. 1123, 146 U. S. 657,* a noted case on the distinction between penal and private laws, the court adopts the above rule.

> "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State. The test whether a law is penal, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual."

In applying this test to various statutes of a similar nature to the one involved here, the courts have held them to be of a penal nature. In the case of *In re United States v. 84 Boxes of Sugar, 8 L. Ed. 745, 7 Peters, 462,* the court in construing a statute which provided for the forfeiture of certain kinds of sugar illegally imported into the United States, said at page 749:

"The statute under which these sugars were seized d condemned is a highly penal law . . ."

In *United States v. Various Tugs and Scows, 225 Fed. 506,* where a violation of the Act of June 29, 1888, (a statute similar to the one under consideration in this case) was involved, the court clearly held it to be a penal statute.

It is evident that sections *407 and 412, 33 U. S. Code* are in their very nature penal. They are statutes which provide for a recovery by the government against an individual or thing for an offense against the state. The wrong which was intended to be redressed was against the public and the penalty which may be recovered is sought by the government and is paid to the government. There is no provision for a recovery by an individual and the very terms of the statutes preclude the idea of their being of a private character.

DEGREE OF STRICTNESS AND CERTAINTY REQUIRED TO CONSTITUTE A VIOLATION OF A PENAL CODE.

A penal statute which imposes a punishment upon a person or thing for a wrong committed against the public requires a much stricter burden of proof than a private statute. From the very nature of a penal statute a conviction cannot be sustained unless the acts complained of are clearly brought within the meaning of the statute. Although as a general rule, there need be only a preponderance of the evidence to sustain a conviction, yet such evidence must clearly bring the alleged acts within the express provisions of

the statute. In *25 C. J. 1205,* the general rule is stated as follows:

> "One who claims a penalty under a statute has the burden of proving the existence of the facts entitling him to the penalty, and must bring his case clearly within the statute."

In an action to recover a penalty, the United States Supreme Court, in *Chaffee v. United States, 21 L. Ed. 908, 85 U. S. 516,* said:

> "In an action to recover a statutory penalty, it is error for the court to instruct the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon developed upon them to establish their innocence, and if they did not, they were guilty beyond a reasonable doubt."

In *State v. Adams Express Co., 87 N. E. 712,* it is stated:

> "One can be subjected to statutory penalties only under the express provisions of the statute, and not by implication or construction."

See also:

Barber Asphalt Paving Co. v. Peck, 186 *Mo.,* 506, 85 *S. W.* 387;

Pilots v. Vanderbilt, 31 *N. Y.* 265;

Tenement House Bd. of Supervision v. Schlechter, 83 *N. J. L.* 88, 83 *Atl.* 783;

Lindberg v. Burton, 41 *N. D.* 587, 171 *N. W.* 616;

Buckeye Engine Co. v. City of Cherokee, 54 *Okl.* 509, 153 *Pac.* 1166.

Assignment No. 5

THE COURT ERRED IN FINDING AS A FACT FROM THE EVIDENCE PRESENTED THAT ON AUGUST 26th, 1937, THERE WAS THROWN FROM THE STEAMSHIP "PRESIDENT COOLIDGE" INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR GARBAGE CONSISTING IN PART OF ORANGE SKINS, CELERY AND TEA LEAVES.

Assignment No. 6

THE COURT ERRED IN NOT FINDING AS A SPECIAL FINDING OF FACT THAT THE REFUSE THROWN FROM THE STEAMSHIP "PRESIDENT COOLIDGE" FELL ENTIRELY UPON THE WITNESS, ARTHUR, AND IN THE BOAT OPERATED BY HIM AND THAT, THEREFORE, NONE OF THE SAID REFUSE MATTER WAS THROWN INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR.

At the close of the government's case in the lower court, the sufficiency of the proof necessary to sustain a violation of *section 407, Title 33, U. S. Code,* was squarely presented. Counsel for the libellee stated (*p. 105 of the record*) :

> "Before proceeding with our case, may we at this time move to dismiss the libel. . . . The second ground of the motion is that there is no evidence that any refuse was thrown, discharged, and deposited from or out of the vessel into the navigable waters . . . that there was not a discharge into any waters; there was a discharge upon a person and into a boat; and, believing the testimony of one witness that he saw some refuse floating around in the water some 20 feet away from the 'Coolidge,' there's been no identification of

that refuse with refuse which was alleged to have been thrown from the vicinity of a deck on the 'President Coolidge.' "

The lower court dismissed the motion merely observing that the government had established by the evidence a *prima facie* case against the libellee. It is the contention of the libellee that there was not sufficient evidence to establish even a *prima facie* case against libellee.

The government placed on the stand in support of its libel of information only two witnesses, one Norman R. Arthur, a harbor patrolman, who, as such, was entitled to a portion of all fines imposed when he discovered a violation of the law, and the other, Philip D. Funtes, a member of the United States Coast Guard. The testimony of Funtes can be disregarded at the very outset as far as concerns his witnessing any of the refuse being in the waters of Honolulu Harbor. He testified that he saw some garbage descending about half way down the stern of the vessel and that he saw the garbage hit Mr. Arthur square on his head. He also testified that there was quite a bit of garbage in Arthur's boat, (*Rec. p. 102*), but as to whether any garbage landed in the water he did not know:

"*Q.* You didn't see any garbage in the water did you?

A. No, from where I was standing I couldn't see it."

Thus, it clearly appears that as far as the witness Funtes is concerned, his testimony does not show a violation of the statute. In fact, his testimony bears out the contention of the libellee that if any garbage was thrown or fell from the "President Coolidge," it landed in the boat of Arthur and not in the waters.

Norman R. Arthur also testified for the government. He is a government employee and in the event a penalty is imposed in this case will be entitled to a one-half share of the amount levied. His testimony discloses that his feelings were hurt and that he was quite annoyed at having refuse dumped on his head. In addition to his manifest interest in the outcome of the suit, because of his contingent interest in any fine, his testimony shows that he was a greatly prejudiced witness. It is obvious that much of his testimony was as to what he *wanted* to see rather than what he *actually* saw. He testified that when the refuse lit on him it blinded him for at least a half minute and that as soon as his eyes cleared he glanced up at the boat. At this point Arthur testified as follows:

"*Q.* And after your vision became clear did you look toward the 'President Coolidge'?

A. Yes, sir, I did.

Q. And what did you see?

A. I seen one fellow up there walk away with a can; he was carrying a can . . .

THE COURT: Seen one what?

A. One Chinese fellow, sir.

THE COURT: All right; go ahead.

MR. McLAUGHLIN: And what was he doing?

A. All I seen him do, he was just walking; he had come from the stern of the boat" (a mere conclusion unsupported by anything) "and was walking over towards the cabins or whatever they call them.

. . . . .

MR. McLAUGHLIN: You say this individual that you saw at that time employed on the 'President Coolidge' was a Chinese individual?

A. Yes, sir.
Q. How was he attired, if you know?
A. As far as I could see, the upper half of him was a black shirt, and it's a little like a blue workshirt the pants he had on" (*pp. 77-78 of the record*).

On cross-examination, the following was further brought to light, concerning the alleged person at the stern of the vessel:

"*Q.* When you looked up, when you finally got your eyes cleaned up and looked up and saw this fellow, you say it was a Chinese fellow?
A. Yes sir.
Q. What kind of shoes was he wearing?
A. I don't know; I couldn't see them.
Q. You testified about the rest of his clothes?
A. Well, you've got only a little vision of a man.
Q. And you were about 60 feet away at that time?
A. Pretty close to it.
Q. You testified about this bucket you claim he was carrying?
A. Yes sir.
Q. What color was the bucket?
A. Kind of dark like.
Q. Kind of dark like?
A. Yes sir.

. . . . .

Q. I think you testified that you saw a Chinese boy walking away from the rail with a can?
A. Yes sir, I did.
Q. And how far away from the rail was he when you saw him?
A. He was only a few feet away from the railing.
Q. Didn't you say 'about five feet' in your direct examination?
A. About around there, yes.
Q. And how far from the stern?
A. That I wouldn't say right off; I don't know.

Q. Did you see his face?
A. No sir, I did not.
Q. How did you know he was Chinese, then?
A. By the general garb of his clothes.
Q. In other words, it was purely a guess as to whether he was Chinese, or haole, or anything else?
A. No. You can tell by the general garb of his clothes and the color of his skin that he's no other nationality.
Q. What part of his skin did you see?
A. I seen his head and neck.
Q. You say you saw the color of his neck but couldn't tell the color of the can?
A. No, I can't because it's a dark can, that's all."

(*pp. 87, 90 of the record.*)

This was the only testimony of any kind offered by the government to connect in any way the throwing of the garbage by an employee of the vessel. Giving the greatest weight possible to Arthur's testimony, there is not a particle of evidence showing that it was an employee of the "President Coolidge" or anyone in any way connected with her, who was responsible for the alleged act. Arthur's statement that the person he saw was employed on the "President Coolidge" is a mere conclusion based on no facts within his knowledge. This is shown by his admission on cross-examination when he said:

"*Q.* After you went on board the Coolidge, did you see this Chinese fellow who, you claim, was carrying the bucket?
A. I did afterwards, yes sir.
Q. How do you know it was the same one?
A. Well, I wouldn't say it was exactly the same one, but just from the general garb of his clothes; if

it had've been the same one I'd have put him under arrest right then.

Q. If it had been?

A. Yes sir.

Q. Then you don't know whether it was the same one or not?

A. No sir." (*pp. 94-95 of the record.*)

Going even further, Arthur's testimony as to his identification of the so-called "Chinese employee" is wholly unworthy of belief. He testified on cross-examination:

"*Q.* And about how long did it take you to clean this stuff out of your eyes so that you could see?

A. Oh, I don't think it would take me over half a minute or so, just enough to wipe my eyes.

Q. I might ask it this way: Where was your boat when you finally could see?

A. I was approximately 50 to 60 feet over, maybe 50 feet from the stern of the boat.

Q. And about what speed were you traveling at that time?

A. Around eight knots.

Q. Well now, isn't it a fact that you didn't see anybody throw anything on you?

A. I did not see it, no." (*p. 86 of the record.*)

Thus, from Arthur's own testimony, he was at least 60 feet from the stern of the ship when he first looked up and due to the fact that "B" deck aft, on which he testified he saw somebody walking back, was at least 35 or 40 feet from the water line (*Testimony of Carl Albert Ahlin, p. 65 of the record*) the total distance from Arthur to "B" deck aft was over 60 feet. Not only that, but from Arthur's own testimony, his boat was proceeding at a rate of eight knots and he stated that he did not clear out his eyes for at least a half minute. A boat travelling at the rate of eight knots an hour

would in a half minute have travelled approximately 405 feet. It thus clearly appears that Arthur's testimony on how far he was from the ship, the Chinese person and the bucket, is wholly in error. And to say that at a distance of 405 feet he recognized a person as Chinese from his "head and neck" is pulling a long bow on one's credulity.

Arthur also testified that he steered his boat over to pier 7, where a Coast Guard boat was tied up, and talked with one of the members of the crew for about four or five minutes. After talking with the Coast Guardsman and changing his clothes, Arthur went aboard the "Coolidge" and conducted an investigation with the chief officer of the vessel. He testified that the refuse landed in the water but he did not explain when he saw it there, nor that any of it came from the vessel. (*Testimony of Norman R. Arthur, pp. 76-83 of the record.*)

On cross-examination it was very clearly brought out that the first time Arthur saw any garbage in the water (celery, orange peelings, and cabbage peelings and tea leaves, *p. 94 of the record*) was when he was coming from pier 7 after he had talked with the Coast Guardsman on pier 7 and was going aboard the "President Coolidge" in his clean clothes. If we adopt his theory of the time, that was at least five minutes after the alleged dumping had occurred. The best one can say for his testimony is that there was some drifting garbage about twenty feet from the stern of the "Coolidge." (*Testimony of Norman R. Arthur, pp. 92-94 of the record.*) There is no showing that the garbage had been thrown into navigable waters. There was testimony that refuse came off the "President Coolidge" and lit on the boat; and there was also testimony that

there was some refuse in the waters about twenty feet astern of the vessel, but nowhere was there any testimony, except by inference or conjecture, connecting the refuse which came off the "Coolidge" with that which another saw in the waters. He testified that there was a Coast Guard Boat at pier 7 and that he did not know whether there were any ships at piers 10 and 11. From which it will be seen that the garbage which he testified he saw in the waters might just as well have come from some other ship. (*Testimony of Norman R. Arthur, pp. 93-94 of the record.*)

It is well to remember that the libel of information was for the violation of a penal statute with a very stiff penalty which might be imposed, minimum $500, maximum $2500, (*section 411, Title 33, U. S. Code*). Where a violation of such a statute is involved, the courts have without exception strictly construed them and required very strong evidence of the acts necessary to constitute a violation. There must be proof beyond any question that the person accused did certain acts which constitute a violation of the statute and no presumptions or inferences will be sufficient.

> ". . . In order to enforce a penalty against a person, he must be brought clearly within both the spirit and the letter of the statute; and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of defendant." *59 C. J. 1118-9.*

And on the general rule of interpretation of a penal statute, it has been most aptly stated:

> "A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy of the law. Although a case may be within the mischief intended to be remedied by a penal

act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language. . . . Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms."

Sutherland on Statutory Construction, p. 439, sec. 350.

The libellant alleged the commission of certain acts by the libellee which if true would constitute a violation of a penal statute subjecting libellee to a penalty. In order to prove a violation the government was required to prove all necessary elements and upon the failure to prove one necessary element there was no violation. It was absolutely essential that there be a showing of refuse being thrown, discharged or deposited from the "President Coolidge" into navigable waters before there could be any liability. The government's case is built on an inference or a supposition, namely, that refuse was thrown from the vessel, therefore, it went into the waters; or that since there was refuse in the waters, it must have come from the "President Coolidge." Either supposition or inference might have been quite logical but that is not what is required to sustain a conviction under a penal statute. There must be direct proof of all acts and evidence of all elements of the violation. It is submitted that there was a complete lack of evidence showing an essential element of the violation.

On still another essential fact the government failed to show that the libellee violated the statute. There was an absolute failure to prove in any way that any person employed by the "President Coolidge" was responsible for any act of dumping any refuse into the

waters of Honolulu Harbor. As has been shown, the only attempt to so connect an employee of the "President Coolidge" was by Arthur's incredible testimony concerning a Chinese person walking back from the "stern" in one place and the "rail" in another (*pp. 77, 90, of the record.*) But assuming Arthur's testimony to be true, it did not in any way show a relation between the alleged Chinese and the dumping nor between the alleged Chinese and the vessel.

Under sections 407 and 412 it is essential to prove that someone connected with the vessel was responsible for the alleged dumping. We are being prosecuted under a penal statute which requires direct proof, not inference or supposition, of all acts essential to constitute a violation. The burden of proof is upon the government to show by a preponderance of the evidence and strict proof that the "President Coolidge" was engaged in a violation of the statute. The government has not met the measure of proof. It has not clearly brought the case within the statute. It has not only failed to establish a *prima facie* case but failed to establish any case and the lower court should have dismissed the libel at the close of libellant's case.

Assignment No. 7

THE COURT ERRED IN FINDING AS A CONCLUSION OF LAW FROM THE EVIDENCE INTRODUCED HEREIN THAT WHEN ON AUGUST 26TH, 1937, SAID REFUSE MATTER WAS THROWN FROM SAID VESSEL INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR, SAID VESSEL WAS A VESSEL "USED OR EMPLOYED" IN A VIOLATION OF 33 U. S. CODE, SEC. 407 WITHIN THE MEANING OF 33 U. S. C., SECTION 412.

Assignment No. 8

THAT THE COURT ERRED IN NOT FINDING AS A CONCLUSION OF LAW FROM THE EVIDENCE INTRODUCED HEREIN THAT WHEN ON AUGUST 26TH, 1937, SAID REFUSE MATTER WAS THROWN FROM SAID VESSEL THAT SAID VESSEL WAS NOT A VESSEL "USED OR EMPLOYED" IN A VIOLATION OF 33 U. S. C., SECTION 407, WITHIN THE MEANING OF 33 U. S. C., SECTION 412.

Assignment No. 9

THAT THE COURT ERRED IN FINDING AS A CONCLUSION OF LAW FROM THE EVIDENCE INTRODUCED HEREIN THAT THE STEAMSHIP "PRESIDENT COOLIDGE" IS LIABLE FOR A PECUNIARY PENALTY IN ACCORDANCE WITH THE PROVISIONS OF 33 U. S. C., SECTION 412.

The libellee was charged with a violation of *section 407, Title 33 U. S. Code,* which provides:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind . . . any refuse matter of any kind or description whatever . . . into any navigable waters of the United States . . ."

The penalty imposed was by virtue of *section 412, Title 33, U. S. Code,* which provides:

> ". . . And any boat, vessel, scow, raft or other craft used or employed in violating any of the provisions of sections 407, 408 and 409, of this chapter shall be liable for the pecuniary penalties specified in the preceding section. . . ."

The second main ground upon which the libellee bases its contention that the lower court erred is that

the steamship "President Coolidge" was not a vessel "used or employed" in a violation of *section 407, Title 33, U. S. Code,* within the meaning of *section 412, Title 33, U. S. Code.* This issue was presented to the lower court at the close of the government's case when libellee made an oral motion to dismiss the libel. The motion was denied and the court, in its special findings of fact and conclusions of law, specifically made the finding that the "President Coolidge" was a vessel "used or employed" within the meaning of the statute (*pp. 17-18 of the record*).

One of the oldest and most well-established rules of construction is that courts will strictly construe all laws of a penal nature and will not by implication extend their meaning beyond the ordinary import of their natural import. The courts will interpret a penal statute to mean just what the legislature has said and cannot extend or enlarge any statute by judicial interpretation. This principle is so generally recognized that it is not necessary to carry this further than to cite a few authorities:

> "Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation . . . 'the rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment.' "
>
> *Sutherland on Statutory Construction, p.* 438, *sec.* 349.

". . . The statute under consideration is highly penal and as such falls within the general rule which requires a strict construction. *U. S. v.* 84 *Boxes of Sugar,* 7 *Pet.* 453. We must so construe it as to carry out the obvious intention of Congress; but, being penal every case must come, not only within its letter, but within its spirit, and purpose. We must have regard to the maxim 'actus non facit reum nisi mens sit rea'; and, unless it clearly and unequivocally appears that the law maker intended a forfeiture without regard to the conduct or intent of the owner, there can be no condemnation of the claimant's property."

U. S. v. 1150½ *Pounds of Celluloid,* 82 *Fed.* 634.

"A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy of the law. Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language. . . . Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms."

Sutherland on Statutory Construction, p. 439 *sec.* 350.

". . . Under the rule of strict construction, such statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used, and will not be held to include other offenses and persons than those which are clearly described and provided for, although the court may think the legislature should have made them more comprehensive."

59 *C. J.* 1115-7.

"But this is denominated a 'penal' statute, and should be strictly construed, and with a view of carry-

ing out the object aimed at by such a statute, or on the grounds of public policy, a court has no right to interpolate words into it, or to give a different meaning to words used from what are their natural import as commonly used."

In re M'Donough, 49 *Fed. Rep.* 360, 362.

It is essential that this rule of strict construction of penal statutes be kept in mind in order to arrive at a proper interpretation of the statutes involved in this case. Under the decision of the lower court, the statutes involved will place an absolute liability upon any vessel from which any refuse is thrown or discharged. The construction placed upon these statutes by the lower court precludes any requirement of knowledge on the part of the owners of the vessel or her officers. It cannot be questioned but that Congress could have, if it so desired, imposed an absolute liability upon vessels for the doing of certain acts without any requirement of knowledge or notice. But before such a liability is imposed courts hold that such intention must be clearly expressed in the statute. A statute will not be held to impose absolute liability unless from the very terms of the statute such a legislative intention is manifest. In *United States v. Various Tugs and Scows, 225 Fed., 506* (*Syl. 3*) it is said:

"A penal statute is to be construed strictly especially where a liability is imposed upon persons who may be in no way at fault."

And to the same effect are the following:

"As a general rule where an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, even when not in terms required. The

legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, although the intent of the doer may have been innocent."

16 *C. J. sec.* 42, 76.

"Purpose to penalize an act innocent of intentional wrong will not be imputed to Congress, in the absence of plain language."

Compagnie Francaise de Navigation a Vapeur v. Elting, Collector of Customs, 19 *F (2d)* 773.

"The purpose is not to be imputed to Congress, in the absence of plain language, to penalize an act innocent of intentional wrong. It would be an unnecessary, and it seems to me an unwarranted, construction to read the statute as intended to subject the vessel owner to a penalty for bringing into the port an alien who has stolen his passage, and whose presence on the vessel may not have been discovered before her arrival. Such a person is not 'imported' within the ordinary meaning of penal laws."

Cunard S.S. Co. Limited v. Stranahan, 134 *Fed. Rep.* 318, 319.

It is with a consideration of the rules of construction which have heretofore been discussed that the statutes involved in this case should be interpreted. The language used in the statutes should be given their normal meaning; that is, the ordinary meaning with which such language is ordinarily associated. There should not be read into the statutes by implication any meaning which does not appear in the statutes by their express terms.

The statute under consideration says:

"It shall not be lawful to throw, discharge, or de-

posit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . any refuse matter. . . ."

The ordinary and normal meaning of the language employed is that no one shall intentionally or knowingly throw, discharge, etc., any refuse matter. The very words themselves indicate that what is being sought to be remedied is the wilful throwing or discharging of refuse matter. The requirement of knowledge and the supposition of intent is inherently contained in the general meaning of the words 'throw' or 'discharge.' This interpretation is further strengthened by continuing in the phrase where it says 'cause, suffer or procure.' Such words clearly require an intent or knowledge before they can be done. Each word in its normal and ordinary sense must mean that the throwing or discharging was wilfully ordered or permitted. The two phrases when read together merely mean that first, no one himself shall knowingly do the prohibited act while secondly, that no one shall knowingly permit or suffer a third person to do the prohibited act.

Section 412 provides:

". . . any boat . . . used or employed in violating any of the provisions of sections 407. . . ."

That section must therefore be read in the light of section 407 and construed in conjunction with it. No penalty is imposed by section 412 without a violation of section 407. And as we have seen, section 407 requires that there be an intent or knowledge to do the prohibited act before any violation occurs. The words "used or employed" can only mean that before a vessel comes within their meaning, there must be some intent to do or knowledge of the prohibited act. Going even further than that, the very meaning of the words "used

or employed" contains the idea that there was an intent or knowledge. Within the ordinary meaning of those words a thing is not being used or employed in doing certain acts unless there was the intent to do such acts. In the *First Edition of Words and Phrases,* vol. 8, p. 7229, the word "used" is twice interpreted and both times is given the same meaning:

> "A fire policy provided that friction matches and camphine should not be used in the building insured. Held: that the word 'use' did not embrace a casual use of camphine and friction matches by a workman employed in the building, contrary to the orders of the assured; the use of camphine and friction matches contemplated in such clause being a use by the authority of the assured, either express or implied. Farmers' & Mechanics' Ins. Co. v. Simmons, 30 Pa. (6 Casey) 229, 303."

> "'Used' in Act June 29, 1888, c. 496, sec. 4, 25 Statu. 209 (U. S. Comp. Stat. 1901, 3536), providing that any boat or vessel used or employed in violating any provisions of the act should be liable, etc., means to make use of, or put to a purpose. Practically the words 'used' and 'employed' are synonymous. Every boat or vessel put to the purpose of violating the provisions of the statute is liable to the penalties and to be put to such or any purpose necessarily requires antecedent determination on the part of her master or owners or of someone with sufficient authority that she shall perform such purpose. A vessel can only be used and employed by or with the consent of the person who has the legal right to use and employ."

Sections 407 and 412 must be construed in the light of an antecedent determination to do the prohibited acts before there is any violation of the statutes. This is the normal construction and there being no express

intent that no intent or knowledge is required, such elements cannot by implication be read into the statute.

Several statutes of a like character to the ones here involved have been construed and passed upon by the Federal Courts. As a result there has come into existence certain rules in regard to such statutes. A case which is almost exactly like the present case and in which a statute almost identical to that under which the present violation was alleged to have occurred, is *United States v. The Anjer Head, 46 Fed. 664.* In that case the statute under which the alleged violation was sought to be punished was the *Act of June 29, 1888 (Stats. at Large, p. 209)* which prohibited dumping in New York Harbor. It was alleged that someone on board of her did deposit ashes in the waters of the harbor, and the court in dismissing the libel said:

> ". . . The facts, as admitted, are that an employee on board the steamship did throw overboard a single scuttle of ashes at the place named. Such employee was undoubtedly technically guilty of violating the statute. But these proceedings are not against him, but are brought against the steamship, being based upon the last clause of section 4 of the statute referred to in the libel. That clause reads as follows: 'Any boat or vessel used or employed in violating any provisions of this act shall be liable,' etc. The emphatic words in this clause are 'used' and 'employed.' Practically, they are synonymous, and they mean 'to make use of,' 'to put to a purpose.' The clause in question, then, renders every boat or vessel 'put to the purpose' of violating the provisions of this statute liable to the penalties. It is quite evident that the Anjer Head was not so engaged in such violation. To be put to such or to any purpose necessarily requires antecedent determination on the part of her master or owners, or of some one with suf-

ficient authority that she shall perform such purpose. A vessel can only be used or employed by or with the consent of the person who has the legal right to use and employ. There is no pretense that there was any such use or employment in this case."

It is submitted that this case should be given great weight in interpreting the statute now under consideration. In that case, as in the present controversy, the words "used or employed" were contained in the statute and likewise the act complained of in both cases was a depositing of refuse by someone unknown to those in charge of the vessel. And just as in *The Anjer Head, supra,* the court construed the phrase "used or employed" to mean "put to a purpose" so in the instant case the identical phrase should be construed to mean an antecedent determination.

The fact that this case was brought under a different statute than that under consideration in *The Anjer Head, supra,* is not material. The present statute is merely an enlargement of a prior act of June 29, 1888, which makes it unlawful to dump or deposit any refuse in any navigable waters of the United States rather than merely in the harbor of New York City. The wording of the Acts as to what constituted a violation is similar and should be likewise similarly construed. It is a well recognized rule that courts will presume that a legislature in reenacting a statute was cognizant of and reenacted it in conformity with the construction which courts have previously placed on the statute or particular words of the statute.

"So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are

presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense in the new statute as in the previous statute."

59 *C. J. sec.* 625, 1063.

". . . In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment."

Hecht v. Malley, 68 *L. Ed.* 949, 956.

In a more recent case where it was sought to hold a defendant liable for the discharging of refuse or oil into New York harbor in violation of *section 441, Title 33, U. S. Code,* the court said:

"Owner of oil barge from which oil leaked into waters of New York harbor held *not* guilty of violating statute prohibiting discharge of refuse, sludge, and oil into such waters, where, unknown to owner, leak in petcock or another part of barge, which was tightly moored, was caused by severe storm, since oil leaked into waters through no direct act of owner, and because of situation over which owner had no control."

United States v. Carroll Oil Terminals, Inc. 18 *F. Supp.* 1008.

Still another case in which a violation of section 441 was alleged to have occurred is *The Colombo, 28 Fed. (2d) 1004, 1005,* and the court, in dismissing the libel, said:

"It cannot be said, especially in view of the fact that the statute must be strictly construed, that a ship, into which oil is being pumped from a barge through an inlet on the ship to which a hose is connected, is being used or employed in violation of any provisions of the act, merely because a person on the barge is pumping valuable oil into the sea through a valve on

the ship which unknowingly has been left open. See the Anjer Head (D.C.) 46 F. 664. It was not intended that the ship or the barge should be used to dump oil into the harbor of New York."

The *Act of June 29, 1888,* supra, has most frequently been applied to cases dealing with vessels used primarily for the purpose of dumping refuse. In two cases, *The J. Rich Steers, 228 Fed. 319,* and *The Watuppa, 19 Fed. Supp., 493,* the situation was presented where a penalty was sought to be imposed against both a tug and a scow for improper dumping by the scow. In both cases the correct interpretation of the words "used or employed" is clearly brought out and held to mean that the vessel to be liable must have been "put to the purpose." In the *J. Rich Steers, supra,* it is said:

> "Under section 4 of the Act of June 29, 1888, as amended by Act Aug. 18, 1894, which provides that 'any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby,' a tug which had no other connection with the violation than that of towing the offending scow is not used or employed in such violation."

While in *The Watuppa, supra,* the court, in holding that a tug which had no connection with the dumping was not liable for a penalty, makes the statement that:

> "Counsel for the government frankly admits that libellant is in possession of no evidence which would attach any liability to the tug or her owner or tends to show willful conduct or negligence directly attributable to the Dumper E-8 or her owner."

One fact which characterizes all the decisions is that before a vessel will be held to have been "used or employed" the acts complained of must have been done at

the direction of or under the control of someone in charge of the vessel. The holding of a vessel *ipso facto* liable merely because of an act having occurred is expressly repudiated. There must be a showing that there was an antecedent determination that certain acts should be done or a directing of certain acts to be done before there is any violation of the statutes.

Applying the proper construction of sections 407 and 412 to the facts in the present case, it becomes quite evident that the "President Coolidge" was not "used or employed" in violating section 407. The government merely showed the happening of certain acts and failed completely to prove that there was any antecedent determination on anyone's part to commit the acts. The testimony of libellee's witnesses precludes the possibility that anyone in charge of the "President Coolidge" had anything to do with the dumping of refuse. The conclusion is inescapable that the acts were done without any knowledge on the part of the owners of the vessel or the officers, and contrary to the express orders and regulations of those in charge.

The Federal courts have at various times had under consideration statutes which, like the one involved in this case, have been penal in character in that they provided for the government being entitled to a fine or forfeiture upon the commission of certain prohibited acts. In all of such cases, the courts have construed the statutes strictly and have refused to impose liability unless there was some evidence showing that there was an intent to do the prohibited acts. They have refused to impose an absolute liability unless the intention of the legislature clearly appears that the mere doing of the acts would constitute a violation. In the case of *In re United States v. 84 Boxes of Sugar, 8 L. Ed. 745,*

7 Peters, 462, the court in construing a statute which provided for the forfeiture of certain kinds of sugar illegally imported into the United States, said at *page 749:*

> "The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly. If, either through accident or mistake, the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred."

The Supreme Court, in construing a statute which provided for the forfeiture of wines and spirits where they were brought into this country without certain marks and certificates, said:

> "The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him."
>
> *In re Cargo of the Ship Favourite,* 2 *L. Ed.* 643, 648, 4 *Cranch,* 347.

A statute which provided for the forfeiture of any goods imported into this country by the means of a false invoice was involved in *United States v. 1150½ Pounds of Celluloid, 82 Fed. 627.* The court in applying the statute to a case where an employee of the owner of certain goods, had, without the owner's consent or knowledge, illegally brought certain goods into the country, said:

> "In order to enforce a forfeiture under the customs administrative act of June 10, 1890, (sec. 9) it is necessary that the acts made a ground of forfeiture shall be done by the owner, or someone for whom he

is responsible, or under whom he derives title; and goods will not be forfeited which are unlawfully brought into this country by a mere trespasser, without the knowledge of the owner or his agent, and with intent to himself appropriate the money provided by the owner for the payment of the lawful duties."

In *Cunard S. S. Co. Limited v. Stranahan, 134 Fed. 318,* the court in construing a statute making it unlawful to bring to the United States any alien afflicted with certain diseases, said:

"Section 9 of Act March 3, 1903 (32 Stat. 1215, U.S. Comp. St. Supp. 1903, p. 175) making it unlawful for any person, transportation company, etc., to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease, and providing if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought to the United States was afflicted with such a disease, 'at the time of foreign embarkation and that the existence of such disease might have been detected by means of a competent medical examination at such time,' such person or transportation company shall pay a fine to the collector, to be enforced by withholding clearance papers from the vessel until its payment, is intended to apply only to a case where a diseased person is brought in by a vessel as a passenger or voluntarily, and when the vessel owner or transportation company has an opportunity to discover the existence of the disease by means of a medical examination before the alien is taken on board, and a vessel owner cannot be subjected to the penalty for bringing into port an alien who has stolen his passage, and whose presence on the vessel was not discovered before her sailing."

Undoubtedly certain cases will be cited as being conclusive on the statutes in question and as to their

proper construction. It might be well at this time to glance at those cases and see how they differ from the facts involved in this controversy. The first case which may be cited is *The Bombay, 46 Fed. 665,* and is a case which deals with the same statute as was construed in *The Anjer Head, supra. The Bombay* does not overrule *The Anjer Head* but is applying the statute to an entirely different factual situation. The court expressly distinguishes *The Anjer Head* decision and on page 668 lays down the true distinction, saying that such cases, referring to *The Anjer Head:*

> ". . . differ from the present, in this: that here the ashes were dumped by firemen, part of the crew of the ship, whose duty it was to clear away ashes created by the furnaces and who in dumping the ashes presumably acted under the orders of an officer of the ship, given in furtherance of the navigation of the ship. In such a case, it seems to me that the ship, so used to dump ashes in an unlawful place by persons authorized to dump her ashes, is used and employed in violating the law, within the meaning of the statute."

The true reason for imposing liability on *The Bombay* was that it appeared that the ashes were dumped by the order of someone in charge or at least there was this presumption which was not overcome. (*See p. 666,* where the court said) :

> "In this case the presumption certainly is that the ashes dumped overboard from this steamer were so dumped by order of some of the persons in authority on board the ship. Firemen do not volunteer to do labor of this character. The burden is therefore upon the ship to overcome this presumption."

And on page 668:

> "The case, then, I find to be this: that ashes were dumped in an unlawful place from the deck of an ocean steamer by her firemen, presumably acting under orders from some superior officer of the steamer; the steamer at the time being engaged in performing a freighting voyage to sea and the dumping of the ashes accumulated at her furnaces being a necessary incident to her navigation. . . ."

In the case of the "President Coolidge" the decision of the court in *The Bombay, supra,* is not at all applicable. The libellee expressly repudiated any presumption that might have obtained that the refuse was dumped by the order of someone in charge (*pp. 106-133 of the record*).

Another case is *The Scow No. 36, 144 Fed., 932,* where the same statute was alleged to have been violated as that which it is alleged was violated by the "President Coolidge." Liability was imposed but again the court is very careful to point out that the acts were done by a person in authority and one who would normally have power to do what he did. This is clearly pointed out at page 935 where the court said:

> "Another objection urged is that this is not a case where the vessel was 'used' for an unlawful purpose within the meaning of the statute. The person on board the scow was placed there by the owner, and was in charge of her, and was there for the purpose of dumping the load which she was supposed to carry in the business in which she was used and in which the owner was engaged, and while the service which the scowman was expected to perform was not performed in accordance with instructions, the wrongful act in question was in a sense within the scope of

his employment, because he was in charge of the scow for the purpose of discharging its load. At least his relation to the scow was not such as would exist in a case where a vessel, or a vehicle, had been taken without leave, and where the possession was wholly without authority and wrongful. The scowman was placed there to do the work of the owner, that of discharging the vessel's load, and under such circumstances the offending vessel should be treated as used in violation of the Act of Congress in question."

Still another decision that will undoubtedly be cited is *The Emperor, 49 Fed. 751,* which involves a tug and a scow used for dumping purposes. The libel was brought against the tug for an act of the scow in dumping refuse contrary to the orders of the captain of the tug. In applying the *Act of June 29, 1888,* supra, to such a situation, the court at page 752 clearly points out the proper meaning of the words "used or employed":

" 'Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any district court of the United States, having jurisdiction thereof.'

"The last sentence quoted, though forming a part of section 4, is equally applicable to all sections of the act. The previous parts of section 4 are confined exclusively to violations of section 4. The controverted question is whether the Emperor in this case was 'used or employed in violating' the act. It is urged that it should be so regarded, because by the previous language of section 4 it is provided that every person, firm or corporation engaged in removing such mud shall be 'responsible for its discharge' within the prescribed limits. It is not easy to determine what

is the intent of this section as respects the use of the word 'responsible'; for the succeeding clause of the same sentence is the only clause that enacts any penalty or consequence of violation; and that clause confines the penalty to the 'person offending,' and prescribes no punishment or fine except upon the person offending. I think the last clause is a qualification and limitation upon the 'responsibility' enacted by the previous clause, in so far at least as to prevent any conviction of an offense, or any punishment by fine, of any person who is not in some way connected by proof with the performance of the illegal act.

"The 'Emperor' in the present case was proceeding in good faith to the prescribed dumping ground. She could not reach it except by first going across the prohibited limits. There was nothing unlawful in her act or intent. Everything that she did was done in the performance of her duty to take the scows to the proper place. She was 'used and employed' for that purpose, and for no other purpose. The dumping before reaching the proper place was by no act, omission, or privity of the tug; but by the willful and criminal act of the men on the scows, wholly independent of the tug, and against the express orders of the captain. It seems to me very clear that neither the captain nor any person on board of the tug, was the 'person offending' under the previous sentence of the section 4; and that the tug was not 'used or employed' in the illegal act of the scowmen. To hold her liable would be to punish the innocent for the guilty; a result never to be reached upon any ambiguous construction of the statute, but only upon its clear and unmistakable meaning. To hold the tug, I must construe the expression used as equivalent to saying that the tug shall be liable for any violation of the act by the scow, or by those on board of the scow, while in tow of the tug; which is certainly a

very different and broader expression than that used by the statute. . . .

"The illegal act was done independently of her, and outside of the scope of her 'use and employment'; and I must, therefore, dismiss the libel."

The *Act of March 3, 1899* (*sections 407 and 412, Title 33 U. S. Code*) was construed in *The Pile Driver No. 2, 239 Fed. 489,* and liability was imposed upon the vessel for the acts of one of her crew in throwing log pile ends into the river. But on page 491, the court maintains the distinction that the other cases have laid down, and says:

"It also appears that the man who threw overboard the obstructions complained of was a member of the pile driver's crew and was acting under orders from the foreman in charge of the work. . . .

"In the present case the entire enterprise was under the direction of those in charge of the pile driver."

The case of *The Scow No. 9, 152 Fed. 548* also construed the *Act of March 3, 1899,* and held:

"Where the owners of a dumping scow placed a man in sole charge with power to dump her load, and he becoming unnecessarily alarmed at the roughness of the sea while being towed to the dumping grounds dumped a part of her load into the waters of a harbor in violation of Act March 3, 1899, c. 425, sec. 13, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3542) the scow is subject to the penalty imposed by section 16 of the act, although the action of the scowman was contrary to the orders of the owner; but the towing tug, although the property of the same owner, where the master had no reason to anticipate the violation of the statute, cannot be said to have been 'used or employed' in such violation, and is not subject to the penalty therefor."

This distinction which has been pointed out in the above cited cases is quite important and necessary to ascertain the true construction of sections 407 and 412. The distinction is that when the acts complained of were caused by someone in charge or someone whose normal duty was to do those acts and the acts were improperly performed, there will be liability. But no liability will be imposed where the acts were caused by someone over whom the person in authority had no control and had given express orders to the contrary. Applying this distinction to the "President Coolidge," it is clear that there can be no liability. At best the government merely proved that there was some refuse which came from the vessel. There was no showing who caused the act complained of. Because of the strict rule covering refuse, it is more reasonable to assume that it was done maliciously and contrary to orders or by a coolie passenger than by a member of the crew under any real or imaginary authority. According to the evidence it could as well have been done through accident as by design. On the other hand, the libellee offered evidence which showed conclusively that the acts were done without the knowledge of anyone of authority and contrary to the express rules and regulations. The government has in no way connected the person who threw the garbage, with the vessel, in any capacity.

We respectfully contend that the lower court erred in overruling the oral motion to dismiss and in rendering a decree in favor of the libellant with the resulting penalty and costs. The evidence produced by the government was insufficient to sustain an alleged violation of section 407. There was no evidence that someone in charge or someone in authority had or could be charged

with knowledge of the purported acts. There was no showing of antecedent determination on the part of some person responsible for the conduct of the boat relative to the conduct complained of.

Sections 407 and 412 do not impose absolute liability but require proof of an intention or negligence amounting to intention to do the prohibited acts. The libellant would no doubt admit that there was no showing of such intention and that there could not be a showing of such intention. Such being the situation it became the duty of the lower court to find in favor of the libellee and dismiss the libel. The mere fact that certain acts occurred does not impose a liability upon the vessel.

CONCLUSION

In conclusion, it is respectfully submitted that the decision and decree of the District Court of the United States in and for the Territory of Hawaii, were in error and must be reversed because there was a complete lack of proof showing a violation by the libellee of sections 407, 411, 412, Title 33 U. S. Code. The decree of the lower court by imposing an absolute liability places an impossible burden upon vessels which no precautionary measures can prevent—a burden never intended by Congress nor required by the statute. If we adopt the theory of the lower court there need only be a showing that refuse came from a vessel and the liability is automatically imposed. If a passenger or a trespasser throws refuse from a vessel lying in any navigable waters of the United States, the vessel, an entirely innocent instrumentality, would be liable.

As was intimated by the lower court, that is the effect of its holding. If a passenger throws overboard a

flower *lei* the fine instantly accrues against the vessel and it will destroy the colorful Hawaiian ceremony of giving flower *leis* to arriving and departing guests as no common carrier can prevent the passengers from dropping or throwing them into the harbor, and no common carrier can afford to pay $500.00 for each violation thus perpetrated.

It is submitted that Congress never intended placing such a liability upon vessels and that by the use of the words "used or employed" Congress did not intend that liability would be imposed unless there was some showing that there was an antecedent determination by someone in charge of the vessel to commit the wrongful acts. Sections 407 and 412 do not impose an absolute liability but presuppose some wrongful intent or knowledge. The government has totally failed in any way to connect the person who allegedly threw refuse overboard from the "President Coolidge" with anyone who was in any way connected with the vessel, and for that reason, the decision of the District Court should be reversed.

Dated at Honolulu, T. H., this 11th day of August, 1938.

Respectfully submitted,

DOLLAR STEAMSHIP COMPANY,
Claimant of, and the STEAMSHIP "PRESIDENT COOLIDGE," her engines, boilers, machinery, tackle, apparel and furniture,
Appellants,

By THOMPSON, WOOD & RUSSELL
By F. E. Thompson
F. E. THOMPSON,
Their Proctors.

Due service and receipt of a copy of the within is hereby admitted this 11th day of August, 1938.

INGRAM M. STAINBACK AND
J. FRANK McLAUGHLIN,

By J. Frank McLaughlin

Proctors for Appellee